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**Before The
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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**Federal Communications Commission
Office of Secretary**

In re:

Request of Cellular Communications of
Puerto Rico, Inc. to Hold an Auction
To License Cellular RSA No. 727A,
Ceiba, Puerto Rico

RM-8897

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To: The Commission

**REPLY COMMENTS ON PETITION FOR DECLARATORY RULING OR,
IN THE ALTERNATIVE, FOR RULEMAKING**

**COMMITTEE TO PRESERVE
LOTTERY SELECTION**

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**REPLY COMMENTS ON PETITION FOR DECLARATORY RULING OR,
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The Committee to Preserve Lottery Selection ("CPLS")^{1/}, by its attorneys, hereby responds to comments filed in the above captioned matter.^{2/} Those comments reinforce CPLS's continuing opposition to switching midstream from lotteries to auctions to license certain cellular rural service areas ("RSAs"), for which applications were filed more than seven years ago.

INTRODUCTION

1. On July 12, 1996, the Commission's Wireless Telecommunications Bureau (the "Bureau") issued a Public Notice announcing that the Bureau would conduct a relottery on September 18, 1996 for six Rural Service Area ("RSA") markets in which the applicants had filed applications for cellular licenses long prior to July 26, 1993 (the "RSA Licenses"), but for

^{1/} The Committee consists of applicants who have applications pending in some or all the RSA markets in which initial licensing has not been completed, including the six markets which were set for lottery on September 18, 1996, only to have the lottery canceled by the Commission. See Exhibit 1 hereto for a complete list of the Committee's membership.

^{2/} CPLS's Reply Comments are timely filed. See *Public Notice*, Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should Be Used to License Certain Cellular Rural Service Areas, DA 96-1685, (October 24, 1996) ("*Public Notice*").

which the original lottery winners had been disqualified.^{3/} On September 9, 1996, Cellular Communications of Puerto Rico, Inc. ("CCPR") filed a "Petition for Declaratory Ruling or Rulemaking" (the "Petition") requesting the Commission to hold an auction to license one of the RSAs, Ceiba, Puerto Rico. One day later the Commission canceled the lottery for the RSA Licenses.^{4/} The Commission decided to treat CCPR's petition as a petition for rulemaking and invited comments on whether to award the cellular licenses by auction in cellular markets in which applicants filed their applications prior to July 26, 1993 and the original lottery winner had been disqualified.^{5/}

2. CPLS filed comments with the Commission on November 25, 1996 in which it opposed switching midstream from lotteries to auctions for applications filed prior to July 26, 1993. Twenty other parties filed comments on the Petition, all but two of which opposed switching from lotteries to auctions. CPLS now submits Reply Comments which focus on points raised by Bell Atlantic NYNEX Mobile, Inc. ("Bell Atlantic") in its comments in support of using competitive bidding in lieu of random selection. In addition, CPLS discusses select comments submitted by the remaining eighteen parties who opposed switching to lotteries.

3. In particular, these Reply Comments argue that the Commission should hold a lottery to select the RSA licenses without further delay because: (1) Bell Atlantic's reliance on the Commission's 1984 change from comparative hearings to lotteries as legal authority for the Commission to switch midstream from lotteries to auctions is flawed; (2) regardless of the

^{3/} *Lottery Notice*, FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner Was Defective, Mimeo No. 63896 (July 12, 1996).

^{4/} *See Public Notice*, Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas, Mimeo No. 65051 (Sept. 10, 1996).

^{5/} *See Public Notice, supra.*

method of selection the Commission ultimately chooses for awarding the RSA licenses, the Commission may only allow the initial RSA applicants to participate in the selection process; and (3) CCPR's prohibited *ex parte* contacts with Commission staff preclude the Commission from switching to auction for RSA Licenses.

ARGUMENT

I. The Commission Cannot Rely On The Change From Comparative Hearings to Lotteries in 1984 As Legal Authority To Switch From Lotteries to Auctions In The RSA Context.

4. Bell Atlantic argues in its comments that a retroactive application of lotteries as the method for selecting cellular licensees after the Commission switched from comparative hearings to lotteries in 1984 provides legal authority for the Commission to use auctions retroactively as the method for selecting RSA licensees after the Commission switched from lotteries to auctions in 1993.^{6/} Bell Atlantic cites the D.C. Circuit's opinion in *Maxcell Telecom Plus, Inc. v. FCC*,^{7/} to support this proposition. Although the court in *Maxcell* found that the Commission could retroactively apply the lottery procedure, it based this determination on several factors not applicable to the current controversy.

5. First, the court found that the efficient processing of applications greatly favored switching from comparative hearings to lotteries, which, among other efficiencies, would save parties the time and expense of preparing expert witnesses and hiring attorneys to assist in the comparative hearings.^{8/} In the present case, the opposite is true. Switching to auctions will be less efficient than conducting lotteries. Rules must be proposed and adopted to implement auctions. The Commission will need to refund the application fees of persons not wishing or

^{6/} *Comments of Bell Atlantic NYNEX Mobile, Inc.* at 3-4.

^{7/} 815 F.2d 1551 (D.C. Cir. 1987) (hereinafter, "*Maxcell*").

^{8/} *Id.* at 1554, 1555.

able to participate in auctions and existing lottery applicants will have to file applications to enter auctions and post funds. Additionally, the Commission has estimated that it may take up to 60 days longer to conduct an auction than a lottery,^{9/} further delaying an already protracted process.

6. Second, applicants for cellular licenses under the comparative hearing procedures first affected by the Commission's change to lottery selection were already on notice when they filed that the Commission might implement a lottery for such licenses.^{10/} Congress first adopted a lottery statute in 1981,^{11/} a year before the first cellular applications for the MSAs ranked 31-60 were filed that were the first ultimately subject to the lottery adopted by the Commission in May 1984. Congress had modified the lottery statute, Section 309(i) of the Communications Act in 1982.^{12/} The modified lottery statute was enacted prior to the filing on November 8, 1982 of the MSA cellular applications for markets 31-60. Thus, these applicants could not have claimed to have relied on the continued use of comparative hearing procedures because Congress had already granted authority for lotteries and the Commission had already considered the future use of lotteries to award these licenses.^{13/} In the present case, RSA License applicants relied on the lottery procedures. There was not even authority to use auctions when they filed. The RSA License applicants formulated business plans, secured financing, and built relationships in

^{9/} Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7387, ¶ 16 (1994).

^{10/} *Maxcell* at 1555; see also *Report and Order*, An Inquiry Into the Use of The Bands 825-845 MHz and 870-890 MHz For Cellular Communications Systems; and Amendment of Parts 2 and 22 Of The Commission's Rules Relative to Cellular Communications Systems, CC Docket No. 79-318, 86 F.C.C.2d 469, 499 (1981) (stating "[f]uture events may, however, dictate a reexamination of appropriateness of using a lottery, auction or hybrid approach for cellular licensing decisions.").

^{11/} See Pub. L. No. 97-35, 95 Stat. 385 (codified at 47 U.S.C. § 309(i)).

^{12/} See Pub. L. No. 97-259, 96 Stat. 1087 (codified at 47 U.S.C. § 309(i)). The amendments to the statute were not germane to the cellular licensing process and only affected mass media applications to be granted by lottery.

^{13/} *Id.*

reliance on the Commission's stated intention to conduct a lottery to award the RSA Licenses.

The applicants could not possibly have foreseen that Congress would change the law to provide for auctions four or five years after they filed their applications.

7. Third, even assuming *arguendo* that *Maxcell* was not inapposite, the Commission and the courts would have to review any analysis of agency retroactivity under the standards enunciated in *Landgraf v. USI Film Products*,^{14/} and *Bowen v. Georgetown University Hospital*,^{15/} which Bell Atlantic must concede pose a considerably higher threshold for permissible retroactivity. The Supreme Court decided *Landgraf* and *Bowen* subsequent to *Maxcell* and both cases demonstrate the Court's strong disfavor with retroactive application of statutory provisions.^{16/} Thus, if the D.C. Circuit were to decide *Maxcell* today, the Commission would face a considerably higher threshold as the proponent of retroactive rules. At the very least, courts would be less likely to permit the retroactive application of statutory provisions today than in 1987 when the D.C. Circuit decided *Maxcell*.

II. The Commission Must Limit the Award of RSA Licenses to the Initial RSA Applicants.

8. In its Petition, CCPR implied that the Commission should auction the remaining RSA Licenses to all qualified bidders who would file applications to participate in such auctions.^{17/} Regardless of the method of selection the Commission ultimately chooses for awarding the RSA Licenses, it must limit participation in the process to the original RSA applicants. CPLS agrees

^{14/} 114 S.Ct. 1483 (1994).

^{15/} 488 U.S. 204 (1988).

^{16/} See *Landgraf*, 511 U.S. at 1497 (finding principles of fairness and reliance to be the basis for a strong presumption against retroactivity) ; *Bowen*, 488 U.S. at 208 (stating "[r]etroactivity is not favored under the law.").

^{17/} *Petition* at 5-6.

with commenters Price Communications Cellular, Inc.; RSA Applicants; TME Cellular Partners; and RSA Operators Group that the Commission may not accept any new applications for any of the six RSA markets.^{18/}

9. The RSA License applicants are entitled to "cut-off" protection from new applicants. In *McElroy Electronics Corp. v. F.C.C.*,^{19/} the D.C. Circuit held that late filers could not participate in a lottery because "timely filers who have diligently complied with the Commission's requirements have an equitable interest in the enforcement of the cut-off rules."^{20/} The RSA License Applicants would be entitled to the same protection against "Johnny Come Lately" applicants. The applicants who complied with the Commission's cut-off rules for filing their RSA License applications have a right to have the Commission enforce these deadlines. Therefore, only the original filers may participate in any process for awarding the remaining RSA Licenses and parties such as CCPR must be excluded.

III. CCPR's Prohibited *Ex Parte* Contacts with Commission Staff Preclude The Commission From Switching to An Auction.

10. Several commenters, including Thomas Domenich and the Committee for a Fair Lottery, Crystal Communications System, and Applicants Against Lottery Abuse,^{21/} argued that CCPR had engaged in prohibited *ex parte* communications with Commission staff related to its Petition. CPLS supports these comments. CCPR evidently contacted Commission staff

^{18/} See Comments of: Price Communications Cellular, Inc. at 6; RSA Applicants at 5; TME Cellular Partners at 5; and RSA Operators Group at 7-8. The same principle would apply to other RSA markets which might be subject to auction in the future.

^{19/} 86 F.3d 248 (D.C. Cir. 1996).

^{20/} *Id.* at 257. Significantly, when the Commission shifted to lotteries from comparative hearings, it did *not* open new filing windows.

^{21/} See Comments of: Thomas Domenich and the Committee for a Fair Lottery at 6-11, Crystal Communications System at 10-12, and Applicants Against Lottery Abuse at 15-18.

concerning a restricted proceeding without providing advanced notice or serving affected parties with copies of written materials as required by the Commission's rules.^{22/} In its *Public Notice* announcing CCPR's petition for rulemaking, the Commission declared that CCPR's petition constituted an impermissible *ex parte* contact in a restricted proceeding.^{23/} CCPR's actions undermine the integrity of the Commission's decision-making process. The sudden cancellation of the lottery process one day after CCPR filed its Petition combined with the fact that one of CCPR's attorneys who engaged in the *ex parte* communications is a former Commission employee with experience in wireless licensing, adds to the appearance of impropriety. The Commission's exposure and acknowledgment of the impermissible *ex parte* contacts does not cure their ill effects. The Commission should seek to resume expeditiously the lotteries for the RSA Licenses to deter future *ex parte* contacts, maintain the integrity of the Commission's decision-making process, and preserve elements of fairness and equity in licensing decisions.^{24/}

CONCLUSION

The overwhelming majority of parties submitting comments agree that the Commission does not have the legal authority to retroactively apply auction provisions to the RSA Licenses or any similarly-situated RSA markets. Precedent precludes the Commission from permitting parties other than the original applicants for RSA Licenses from participating in the award of the Licenses. Finally, CCPR engaged in impermissible *ex parte* contacts with Commission staff which reflect unfavorably on the Commission's decision-making process in this matter. For the

^{22/} 47 C.F.R. § 1.1202(b).

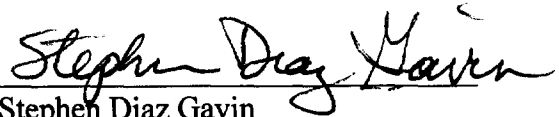
^{23/} *Public Notice, supra*, at 2.

^{24/} The D.C. Circuit has recently cautioned the Commission about the pernicious effects of *ex parte* communications in adjudicatory proceedings. *Press Broadcasting, Inc. v. F.C.C.*, 59 F.3d 1365 (D.C. Cir. 1995). CPLS supports the sanctions proposed by the Committee for a Fair Lottery as a proper deterrent to future misconduct. See Comments of Thomas Domenich and the Committee for a Fair Lottery, ¶ 16.

foregoing reasons, the Committee to Preserve Lottery Selection respectfully urges the Commission to act expeditiously to dismiss CCPR's petition for rulemaking and instead follow its existing procedures relied upon by the RSA applicants to award the RSA Licenses by lottery.

Respectfully submitted,

**COMMITTEE TO PRESERVE
LOTTERY SELECTION**

A handwritten signature in cursive script that reads "Stephen Diaz Gavin".

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CERTIFICATE OF SERVICE

I, Tracy Powell, hereby certify that a copy of the foregoing "Reply Comments On Petition For Declaratory Ruling Or In The Alternative, For Rulemaking" was served by first class mail unless otherwise indicated on the following:

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